GOO SING KAR

v.

DATO' LIM AH CHAP & ORS AND OTHER APPLICATIONS

HIGH COURT MALAYA, KUANTAN
RAMLY ALI JC
[CIVIL SUIT NOS: 22-52-2001, 22-94-2001,
22-95-2001 & 22-96-2001]
24 JANUARY 2002

CIVIL PROCEDURE: *Injunction - Ex parte interim injunction - Application to set aside - Whether can be made ex parte - Whether applicant made out a case of sufficient cogency - Whether the other party informed of application to set aside - Whether the other party made frank and full disclosure when applying for injunction*

The four *ex parte* applications herein ('the applications') were made by the defendants to discharge four *ex parte* injunctions granted earlier to the plaintiff and for damages to be assessed. The applications were filed on 23 January 2002 and heard together the next day. The plaintiff's solicitors were notified of the applications *via* facsimile just before 5pm on 23 January 2002 but did not appear at the hearing of the applications on 24 January 2002. The issue that arose for decision was whether an application to set aside an *ex parte* injunction can itself be made *ex parte.*

Held:

[1] An injunction granted *ex parte* may be discharged upon an *ex parte* application to have it so discharged provided a case of sufficient cogency has been made out and the party to whom the injunction was granted has been informed of the application. Both these conditions had been satisfied by the defendants herein. (pp 254 b-i, 255 a-e, f)

[2] An *ex parte* application for an interim injunction made without a full and frank disclosure of the material facts will, in the absence of special circumstances, be dismissed; and if an injunction has been granted in such a situation it may be set aside. In the present case, the plaintiff had failed to make a frank and full disclosure of the material facts within his knowledge when he applied *ex parte* for the injunctions. (pp 256 e-f, h, 257 h & 258 c)

[Defendants' applications allowed; injunctions set aside; damages to be assessed.]

Case(s) referred to:
Bakmawar Sdn Bhd v. Malayan Banking Bhd [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323 ***(refd)***
Castle Fitness Consultancy Pte Ltd v. Manz [1990] 1 MLJ 141 ***(foll)***
Clifton v. Robinson [1853] 16 Beav 355 ***(refd)***
Daglish v. Jarvie [1850] 2 Mac & G 231 ***(refd)***
Dato' Hamzah Abdul Majid & Anor v. Wembley Industries Holdings Bhd & Ors [1998] 2 CLJ 754 ***(refd)***
Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1991] 2 MLJ 564 ***(refd)***
London City Agency (JCD) Ltd v. Lee [1970] Ch 597 ***(foll)***
Professor Dr A Kahar Badar & Ors v. N Krishnan & Ors [1982] CLJ 370; [1982] CLJ (Rep) 630 ***(refd)***
Subramaniam Lakshamanasamy v. Datuk S Samy Vellu & Ors [1998] 1 MLJ 42 ***(foll)***
Thomas A Edison Ltd v. Bullock [191] 15 CLR 679 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1(2B), (2BA)

Other source(s) referred to:
Atkin's Form, 1986 reissue, vol 22, p 84

For the defendants - Jacob Goldie; M/s Jacob Goldie

Reported by Gan Peng Chiang

JUDGMENT

Ramly Ali JC:
These grounds of judgment are in respect of four different applications of the same nature in four different cases ie, Civil Suits Nos. 22-52-2001, 22-94-2001, 22-95-2001 and 22-96-2001 involving the same plaintiff, one Mr. Goo Sing Kar, and the defendants in all the four suits are individuals and companies from the same group of companies headed by Dato' Lim Ah Chap as the first defendant. The four applications, the subject matter of these grounds of judgment were filed by all the defendants in each of the four suits separately, to discharge four *ex parte* injunctions earlier granted to the plaintiff and to assess damages suffered by the defendants as a result of the said *ex parte* injunctions. The four applications by the defendants were made *ex parte* and were heard together since they involved the same plaintiff and the same issues and facts.

In all the four cases, the plaintiff had earlier obtained *ex parte* injunctions against each of the defendants on 10 January 2002. In respect of case No. 22-52-2001 the *ex parte* injunction was worded as follows:

a 1) Satu perintah injunksi bahawa Defendan Pertama, Kedua, Keempat, Kelima, Keenam, Ketujuh dan Kelapan oleh mereka sendiri, ejen atau pengkhidmat mereka atau selanjutnya ditahan dari mengekstrak, mengeluarkan, mengalihkan, menjual, melupuskan dan/atau dengan apa cara lain mengendalikan hak-hak mengekstrak, mengeluarkan dan menjual kayu balak yang dibeli oleh Defendan Ketiga menurut Perjanjian bertarikh
b 18.7.1998 dan diperolehi dibawah kelulusan kawasan pembalakan rujukan Pejabat Pengarah Perhutanan No. PNH.PHG.(S)9/74 S.J. 15(3) dan lesen-lesen pembalakan:

i) JT19/99 (KP) seluas lebih kurang 75.43 hektar;

c ii) JT20/99 (KP) seluas lebih kurang 45.81 hektar;

iii) JT2/2000 (TPS) seluas lebih kurang 62.29 hektar;

iv) JT/2001 (KP) seluas lebih kurang 71.63 hektar;

v) JT9/2001 seluas lebih kurang 52.00 hektar.

d 2) suatu perintah injunksi bahawa Defendan Pertama dan Kedua oleh mereka sendiri, ejen atau pengkhidmat mereka atau selainnya ditahan dari menjual, meluluskan, mencagar dan/atau dengan apa cara lain mengendalikan harta-alih dan hartanah-hartanah Defendan Ketiga;

e 3) suatu perintah injunksi bahawa Defendan Pertama dan Kedua oleh mereka sendiri, ejen atau pengkhidmat mereka atau selainnya ditahan dari menjual, melupuskan, mencagar dan/atau dengan apa cara lain mengendalikan saham dan saham-saham Defendan Ketiga.

4) Akhirnya diperintahkan bahawa permohonan *inter partes* untuk
f pendengaran pada 31 haribulan Januari, 2002.

In respect of cases No. 22-94-2001, 22-95-2001 and 22-96-2001, all the *ex parte* injunctions were worded as follows:

1) suatu perintah injunksi bahawa Defendan Pertama sendiri, ejen atau
g pengkhidmat mereka atau selainnya ditahan dari menjual, melupuskan mencagar dan/atau dengan apa cara lain mengendalikan harta-alih dan hartanah-hartanah Defendan Kedua;

2) suatu perintah injunksi bahawa Defendan Pertama sendiri, ejen atau pengkhidmat mereka atau selainnya ditahan dari menjual, melupuskan,
h mencagar dan/atau dengan apa cara lain mengendalikan saham dan saham-saham Defendan Kedua.

3) Akhirnya diperintahkan bahawa permohonan *inter partes* ditetapkan untuk pendengaran pada 31 haribulan Januari, 2002.

i

All the *ex parte* injunctions were served on all the defendants within seven days as required under O. 29 r. 1(2BA) of the Rules of the High Court 1980 (RHC). The defendants then filed their respective applications to discharge all the *ex parte* injunctions under O. 29 r. 1(2B) of the RHC 1980 on 23 January 2002. The applications were made *ex parte* before the expiry of the 21-day period for the *ex parte* injunctions, supported by the affidavits of Dato' Lim Ah Chap (the first defendant in all the four cases) and certificates of urgency. All the four applications were heard together on 24 January 2002, *ex parte*. All the defendants were represented by Encik Jacob Goldie from Tetuan Jacob Goldie & Toh. On 23 January 2002 the defendants' counsel sent a written notice to the plaintiff's counsel, Tetuan Shahrul Balvinder & Co. *via* facsimile, enclosing all the relevant *ex parte* applications. The defendants' counsel produced TX report to confirm fax transmission that was transmitted to Tetuan Shahrul Balvinder & Co. at 4.54pm on 23 January 2002. The defendants' counsel also showed a letterhead of Tetuan Shahrul Balvinder & Co. to show that the office hours is between 8.30am to 5.30pm (Monday to Friday). The notice also stated that the defendants' counsel has applied to have the applications heard on 24 January 2002 and invited the plaintiff's counsel to attend court.

On 24 January 2002, when the applications were heard at 11.30am, the plaintiff's counsel did not turn up. The defendants stressed on the urgency of the matter and requested that their applications be heard and determined immediately. The defendants' counsel contended that the terms of the *ex parte* order dated 10 January 2002 are very wide and the effect is to stop the defendants' operation. The *ex parte* injunction adversely affecting the entire operation of the defendants' companies, thus also affecting the defendants' workers, contractors, customers and financial institutions which have been dealing with the defendants. Since the date when the order was served on the defendants, the defendants' operation had come to a standstill. The defendants were gravely prejudiced by the continuance of the injunction. The injunction among other things, prohibits the defendants, their agents or servants from selling, disposing, charging and/or dealing in any movable or immovable properties of the defendants. The terms are so wide. In actual fact, the injunction prevented the defendants from carrying out their daily business operation for fear of being in contempt of court.

The applications to set aside the *ex parte* injunction order were made under O. 29 r. 1(2B) of the Rules of the High Court 1980 (RHC) which reads:

> (2B) Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall be automatically lapse at the end of 21 days from the date on which it is granted.

The said O. 29 r. 1(2B) clearly envisages that an interim injunction obtained on an *ex parte* application can be revoked or set aside before the expiry of 21 days. It gives the court powers to do so. However, the issue that has to be determined here is whether an application to revoke or set aside the said *ex parte* interim injunction can be made *ex parte*?

The English practice is that an injunction granted *ex parte* may on sufficiently cogent grounds be discharged or waived on an application itself made *ex parte*. This principle was decided in *London City Agency (JCD) Ltd. v. Lee* [1970] Ch. 597; [1969] 3 All ER 1376. The authors in *Atkin's Form* (1986 re-issued vol. 22 at p. 84) are of the opinion that an interlocutory injunction may be discharged on an *ex parte* application provided:

a) a case of sufficient cogency can be made out; and

b) the plaintiffs are informed of the application.

In *London City Agency (supra)*, Megarry J had said:

> In my judgment the court has ample jurisdiction to make such an order, and there is no established rule of practice to prevent the court doing so in a proper case. I do not accept what is said in *Halsbury* as a correct statement of the present law. The court will grant an interlocutory injunction on an *ex parte* application if a case of sufficient cogency is made, and no reason has been suggested why, if an application *ex parte* to discharge or vary such an injunction is supported by sufficiently cogent grounds, the courts should not do what is sought. If time permits, it is plainly preferable that any such application should be made on due notice; but in a case of sufficient urgency, ... I cannot believe it to be the law that however clearly it has been established that it would be wrong for the injunction to continue in force unchanged, the court is impotent to discharge or vary it until notice of motion has been given and has expired, especially where (as here), the counsel for those entitled to the injunction has in fact been present on the hearing of the *ex parte* application for the discharge or variation. Accordingly, in my judgment, the only question here is whether the applicants *ex parte* have made out a sufficient case for discharging or varying this injunction.

In Singapore, the position of the law is the same. In *Castle Fitness Consultancy Pte. Ltd. v. Manz* [1990] 1 MLJ 141 (also [1989] SLR 896), the High Court in Singapore, in discharging an *ex parte* injunction, held that an interlocutory injunction can be discharged on an *ex parte* application if a case of sufficient cogency is made out and the plaintiffs had been informed of the application.

In Malaysia, the position of the law is also the same. The principle as laid down in *London City Agency (supra)* was followed by Mohamed Dzaiddin J (now CJ), in *Subramaniam Lakshamanasamy v. Datuk S. Samy Vellu & 4 Others* [1998] 1 MLJ 42. Again in *Lim Hean Pin v. Thean Seng Co. Sdn. Bhd. & Ors* [1991] 2 MLJ 564, Mohamed Dzaiddin J (now CJ) has ruled:

The court can dissolve an *ex parte* injunction made on an *ex parte* application provided a case of sufficient cogency can be made out and the plaintiffs are informed of the application.

However, in that case *(Lim Hean Pin)* the defendant's application was refused on the ground that the plaintiff was not informed of the application and this is fatal to the defendant's application to set aside the plaintiff's interim injunction *ex parte*. More recently, in *Dato' Hamzah Abdul Majid & Anor v. Wembley Industries Holdings Bhd. & Ors* [1998] 2 CLJ 754, KL Rekhraj J, in following the principle laid down in *London City Agency (supra)*, has ruled that an *ex parte* injunction can be set aside by an application made *ex parte*, based on grounds that there was non-disclosure of material and cogent relevant facts when the *ex parte* injunction was applied.

In the present case, I see no reason why I should depart from the principle which has been accepted by our courts based on the above cited authorities. I should also apply the same principle to the present case. In doing so, I must be satisfied that:

(i) the plaintiff is informed of the application; and

(ii) a case of cogency has been made out by the defendants.

The defendants' counsel informed the court that on 23 January 2002 at 4.56pm he had sent all the relevant documents pertaining to the application to the plaintiffs counsel, Tetuan Shahrul Balvinder & Co., *via* facsimile. He produced the TX report to confirm that the transmission was affected and duly accepted during the ordinary office hour of the plaintiff's counsel's firm. On that premise, I was satisfied that the plaintiff's counsel was duly informed *via* facsimile of the intended application which was to be made on 24 January 2002. On 24 January 2002, the applications were only heard at 11.30am, after giving sufficient time (3 1/2 hours) for any response from the plaintiff's counsel. The plaintiff's counsel did not turn up for the hearing. The plaintiff's counsel had not even contacted the court *via* telephone to enquire about the applications.

The defendants' counsel complained that until 24 January 2002, the plaintiff had only served two documents on the defendants namely the said *ex parte* injunction dated 10 January 2002 and *inter partes* application for injunction which is fixed for hearing on 31 January 2002. The defendants' counsel has to make all the necessary searches in the court's file in order to get copies of all the other relevant papers. In his summons-in-chambers *(ex parte)* applying for the *ex parte* injunction, the plaintiff has made two undertakings namely: one is to damages and the other one that he would serve copies of the *ex parte* application together with his affidavit in support of the said

application on the defendants within seven days from the date of the *ex parte* injunction order. Paragraph 1(i) of the plaintiff's summons-in-chambers clearly provides:

> (1) Bahawa diatas akujanji Plaintif melalui peguamnya untuk:
>
> (i) menyampaikan sesalinan Permohonan *ex parte* injunksi ini dan Afidavit yang difailkan untuk menyokong permohonan untuk Perintah ini keatas Defendan-Defendan dalam tempoh satu minggu daripada tarikh perintah yang membolehkan injunksi, menurut Aturan 29, Kaedah 2BA, Kaedah-Kaedah Mahkamah Tinggi 1980.

Sad to say, the plaintiff had only served the *ex parte* injunction order and the new *inter parte* application fixed to be heard on 31 January 2002. Clearly the plaintiff has failed to comply with his own undertaking, at least until 23 January 2002 when the defendants filed their applications to set aside the *ex parte* injunction. It was already more than seven days from the date when the *ex parte* injunction was granted on 10 January 2002. This is a clear case of an abuse of the court process.

I have heard the lengthy submissions by the defendants' counsel as well as all the affidavits affirmed by Dato' Lim Ah Chap (the 1st defendant in all the four cases). In my view, a case of sufficient cogency was made out. The defendants were gravely prejudiced by the continuance of the *ex parte* injunction. I also had serious reservations as to whether full and frank disclosure was made by the plaintiff when he applied and obtained the *ex parte* injunction. Special duties arise when an application for an *ex parte* interim injunction is made. Where an *ex parte* application is made, the plaintiff is obliged not only not to mislead the court but in addition, he is under a duty to disclose to the court all matters which are within his knowledge which are material to the proceedings and which are or may be in favour of an absent party. A matter is regarded as material if it is a factor that the court will take into consideration in the exercise of its discretion. In *Clifton v. Robinson* [1853] 16 Beav 355; 51 ER 816 (as cited in *Castle Fitness Consultancy* case), it has been held that the failure to inform the court of a material fact is not excused merely because the party seeking interlocutory relief has forgotten its existence. It has also been held in *Daglish v. Jarvie* [1850] 2 Mac & G 231; 42 ER 89, that a plaintiff is not necessarily excused because he believed that particular matters known to him are not material to the proceedings. Hence, if on an *ex parte* application, the plaintiff does not make full and frank sufficient disclosure, his application will, in the absence of special circumstances, be dismissed. If an injunction has been granted, it can be set aside. In this respect, I am in full agreement with Coomaraswamy J in *Castle Fitness Consultancy* case when he said:

> This is a rule based on public policy. It is designed to prevent abuse of the procedure of court by a person who has a special advantage in view of the absence of the other party. The Court should deal with great strictness and severity with persons who apply for *ex parte* injunctions. A party applying is bound to put the Court in possession of all the facts in order to enable it to judge whether the Defendant ought to be put to what may be described as a very serious sanction, ie a temporary injunction.

I am also in full agreement with Issacs J in *Thomas A Edison Ltd. v. Bullock* [1912] 15 CLR 679, when he said:

> *Ubberima fides* is required, and the party inducing the court to act in the absence of the other party fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which the party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fail.

Back to the present case, the plaintiff had not disclosed some material and cogent facts when he applied for the *ex parte* injunction on 10 January 2002. There was a series of letters between the defendants' counsel and the plaintiff's counsel since 19 November 2001, giving indication that in the event the plaintiff decided to apply for an injunction against the defendants, notice should be served on the defendants' counsel, who were willing to appear on their behalf. These facts were not disclosed to the court.

Another very material fact that was not disclosed was about the settlement agreement between the plaintiff and Dato' Lim Ah Chap (the 1st defendant in all the four cases). Apparently there was dispute between the plaintiff and Dato' Lim Ah Chap. This dispute led to the filing of suit No. 22-52-2001 by the plaintiff against Dato' Lim Ah Chap and the other defendants. This settlement agreement according to the defendants' counsel is a global one ie, for settlement of all the disputes between them. In that settlement agreement, the plaintiff agreed to give up all his rights and liabilities in all the defendants' companies for a liquidated sum of RM13 million to be paid by Dato' Lim Ah Chap. Apparently, the plaintiff was in breach of that settlement agreement and as such the defendants filed a civil suit No. 22-93-2001 against the plaintiff, on 10 November 2001. Immediately after that, the plaintiff then filed three other suits against the defendants *vide* Civil Suits No. 22-94-2001, 22-95-2001 and 22-96-2001 and applied for *ex parte* injunction (the subject matter of the present proceedings). All these facts are material to the present proceedings and were not disclosed by the plaintiff when he applied for the *ex parte* injunction. In respect of Suit No. 22-52-2001, it was also agreed in the settlement agreement that as a package settlement, the said suit would be

discontinued. A notice of discontinuance was signed and filed by both counsels for the parties. Again, this fact was also not disclosed by the plaintiff. In respect of all the four cases, the plaintiff complained about mismanagement of the main company ie, TK Mining Sdn. Bhd. In fact in suit No. 22-52-2001 the plaintiff had applied for an appointment of a receiver and manager, which was duly granted by the court. The plaintiff had not disclosed to the court when he applied for the *ex parte* injunction that the receiver and manager, after having obtained all information from the relevant parties had concluded that the account of the said TK Mining Sdn. Bhd. were in order. Again this fact was not disclosed.

The plaintiff did not come with clean hands. He had failed to make full and frank disclosure. If the court had known all these relevant facts before making the *ex parte* injunction on 10 January 2002, the court may not grant the order, especially some of the defendants are multi-million business concerns. In *Professor Dr. A. Kahar Badar & Ors v. N. Krishnan & Ors* [1982] CLJ 370; [1982] CLJ (Rep) 630 Hashim Yeop Sani J (as he then was) said that the suppression of a material fact must be of such a character as to mislead the court or if the true picture was presented the court would probably not have granted the injunction. Those facts which were not disclosed by the plaintiff in the present case are very material for the court to know in dealing with the application as made and that the materiality is to be decided by the court and not based on the assessment of the applicant or his legal advisers. It is the duty of the plaintiff to highlight and to draw the attention of those facts in his application (see: *Bakmawar Sdn. Bhd. v. Malayan Banking Bhd.* [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323).

On the above consideration, I am satisfied that a case of sufficient cogency was made out by the defendants in applying to set aside the *ex parte* injunction obtained by the plaintiff on 10 January 2002, by way of *ex parte* application. I am also satisfied that the plaintiff's counsel had effectively been notified of the applicafion. In the premise, it is my considered judgment that all the *ex parte* injunctions in all the four cases obtained on 10 January 2002 be discharged and set aside. I am also of the opinion that the plaintiff's undertaking as to damages when he applied for the *ex parte* injunction can be invoked. Therefore I also order that the defendants' damage be assessed by the senior assistant registrar, to be paid by the plaintiff in respect of any consequential damage suffered by all the defendants as a result of the said *ex parte* order.